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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1326

JAMES E. HENDERSON, EXECUTOR OF THE LAST WILL AND TESTAMENT OF NELLIE EURETTA TAYLOR, DECEASED, PETITIONER

v.

ETHEL STRICKLAND ROGAN, INDIVIDUALLY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF NAT ROGAN, FORMER UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE SIXTH COLLECTION DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 333–336) and the findings of fact and conclusions of law (R. 361–368) are unreported. The opinion of the Circuit Court of Appeals (R. 659–671) is reported in 159 F. 2d 855.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 8, 1947 (R. 658). A petition for a writ of certiorari was filed on May 5, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Did the courts below err in holding that the value of the remainder of a trust fund was includible in the gross estate of the decedent under Section 302 (f) of the Revenue Act of 1926, as property passing under a general power of appointment exercised by the decedent by deed intended to take effect in possession or enjoyment at or after her death.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations involved are set out in the Appendix, *infra*, pp. 9–11.

STATEMENT

A portion of the facts in this case were stipulated by the parties (R. 59–70), and those which were material and nonevidentiary were found by the trial court as stipulated (R. 362). Oral testimony and exhibits were also introduced (R. 403–626). The facts found by the lower court and which are considered material to the present controversy may be summarized as follows:

The decedent's husband, George Wesley Taylor, established a trust on February 6, 1931, transferring to it assets which were his separate property (R. 12–21, 60–61). The decedent, Nellie Euretta Taylor, was to be paid the income during her lifetime and the trustees, in their discretion, could use the principal for her support and comfort if there was a deficiency in income (R. 13, 15). Paragraph III of the trust instrument (R. 14) provided that the decedent should have the power to appoint and dispose of the principal and income of the trust estate after her decease "to be exercised not by Will, but only by the last, unrevoked written instrument exercising such power and on file with the Trustee at the time of her death". The decedent's power was expressly made revocable and it was provided that in default of appointment the property should go to her heirs at law determined under the laws of California. (R. 14.) The trust instrument was signed by both the decedent and her husband (R. 21).

On February 7, 1931, the day following the execution of the trust, the decedent exercised the power of appointment in favor of her husband; the power to revoke the appointment was expressly reserved (R. 26). Following the death of her husband in 1932, the decedent on April 7, 1932, revoked the exercise of the appointment dated February 7, 1931, and provided (R. 27):

> I further direct that upon my death this entire trust estate shall become a part of

> my estate and be distributed according to the terms of my Last Will and Testament, and/or to my heirs at law under the California Succession Statutes if I die intestate.

This exercise of the power of appointment, which was duly filed with the trustee (R. 61), was never revoked by the decedent during her lifetime (R. 364). On December 31, 1935, the decedent filed with the trustee a document entitled "Explication of 'Power of Appointment'" which, in part, again expressed her intention that the trustee should deliver the trust assets to her executor or administrator on her death (R. 28–29, 61–62).

On September 15, 1934, the decedent executed her last will and testament, under the terms of which the residuary estate was to be held in trust for certain named individuals (R. 31–42, 63). A codicil, dated July 8, 1935, did not affect the disposition of her residuary estate (R. 42–43). The decedent died on January 27, 1936 (R. 59). The assets of the trust estate created by her husband were delivered to her executor, the taxpayer (R. 61).

The District Court held that the assets of the trust were properly included in decedent's gross estate and subject to the estate tax on the ground that the property passed under a general power of appointment exercised by the decedent by deed intended to take effect in possession or enjoyment at or after the decedent's death (R. 367–368), and entered judgment for the respondent (R. 369–

370). The Circuit Court of Appeals affirmed (R. 658).

ARGUMENT

There is no conflict of decisions and none is asserted in the petition for certiorari. Under its facts, this case falls squarely within the ambit of the statute and the courts below so held. There is no warrant for further review by this Court.

1. A comparison of the undisputed facts with the language of Section 302 (f) of the Revenue Act of 1926 (Appendix, *infra*, p. 9), "to the extent of any property passing under a general power of appointment * * * (2) by deed * * * intended to take effect in possession or enjoyment at or after his death" clearly shows that the property was includible in decedent's gross estate because the power was exercised by deed and was intended to take effect in possession or enjoyment at or after decedent's death. Since there were no instructions concerning the persons in whose favor the appointment could be exercised, it is clear that the decedent possessed "a general power of appointment". *Morgan* v. *Commissioner*, 309 U. S. 78. And, as a result of the decedent's appointment, interests were created in the property which were different from those that would have existed in default of an exercise of the power.[1] Thus there was a "passing" of property

[1] Under the decedent's will, one of her heirs at law, Isabel Henderson (R. 66–67), was given no interest in the property (R. 38–39).

under the power of appointment. *Estate of Rogers* v. *Commissioner,* 320 U. S. 410. See Article 24 of Treasury Regulations 80 (Appendix, *infra,* pp. 10–11).

The power granted to the decedent related only to the disposition of the trust estate "after her decease". And the decedent actually exercised the power by directing "that upon my death" the property "shall become a part of my estate and be distributed according to the terms of my Last Will and Testament". Moreover, the decedent retained until the moment of her death the power to revoke this deed and to make a new appointment. (R. 27.) It is clear, therefore, that the exercise of the power was "intended to take effect" in possession or enjoyment at or after her death within the meaning of the statute.

2. Taxpayer's argument (Pet. 9–11) that it was not decedent's intention but that of her husband which is controlling is without merit. The language "intended to take effect in possession or enjoyment", appearing in Section 302 (f), is identical with the phrase used in Section 302 (c) dealing with *inter vivos* transfers. This Court has always determined the applicability of the statute by ascertaining the type of interest which the transfer created rather than the personal subjective intention of the individual. *Helvering* v. *Hallock,* 309 U. S. 106; *Fidelity Co.* v.

Rothensies, 324 U. S. 108; *Commissioner* v. *Estate of Field,* 324 U. S. 113; *Goldstone* v. *United States,* 325 U. S. 687. See Article 17 of Treasury Regulations 80 (Appendix, *infra,* p. 9).

The "intended" phrase in subsection (f) modifies the word "deed" just as it modifies "transfer" in subsection (c). If the intention of a donee of a power has any bearing on the matter, an objective intent alone would be material. Where an instrument, whether it be an exercise of a power of appointment or an *inter vivos* transfer, creates interests of the kind described by the statute, those are the interests which the donee intended to create. In this case, the decedent's power of appointment would only be effective at her death and could only create interests that would come into possession and enjoyment after her life estate was terminated by death. Moreover, the intention or state of mind of decedent, even if here material, would present a pure question of fact and the trial judge has found (R. 363–364) that decedent did intend, and was motivated by the desire, that the transfers take effect at or after her death. The fact that the donee is powerless to create interests taking effect in possession and enjoyment before death does not support a conclusion that she does not intend to create interests taking effect in possession or enjoyment at or after death. Plainly, she intended to do what she had the power to do.

CONCLUSION

The decisions below are correct, there is no conflict, and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MAY, 1947.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, * * *.
>
> * * * * *

Treasury Regulations 80 (1934 ed.), promulgated under the Revenue Acts of 1926 and 1932, as amended by T. D. 4729, 1937-1 Cum. Bull. 284, 285:

> ART. 17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), remained in the decedent at the time of his death and the passing thereof was subject to the condition precedent of his death. If the

tax applies, it does so without regard to the time of the transfer, whether before or after the enactment of the Revenue Act of 1916.

* * * * *

ART. 24. *Property passing under general power of appointment.*—The value of all property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor) if the power is exercised by will and such donee dies after the enactment of the Revenue Act of 1918. It should be so included if the power is exercised by deed or other instrument executed subsequent to September 8, 1916, in contemplation of death. (See article 16.) It should also be so included if the power is exercised by deed or other instrument with the intent that the transfer shall take effect in possession or enjoyment at or after the death of the donee of the power. (For description of transfers included in the phrase, "intended to take effect in possession or enjoyment at or after * * * death," and the taxability thereof with reference to when made and when the death occurred, see articles 17, 18, and 19.) The statute, however, does not require inclusion in the gross estate of the value of the appointed property in the case of a bona fide sale thereof by the donee of the power for an adequate and full consideration in money or money's worth.

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power. If the donee is required to appoint to a specified person or class of

persons, the property should not be included in his gross estate. If the decedent died prior to the effective date of the Revenue Act of 1918, the value of the appointed property is not to be so included. Duplicate copies of the instrument granting the power and of the instrument by which the power was exercised, one of each to be certified or verified, must be filed with Form 706 in all cases, unless the decedent was a nonresident, in which case only one copy of each instrument, certified or verified, is required.

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